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IN THE

Supreme Court of the United States

October Term, 1980

McArthur Davis,

Petitioner

vs.

Florida East Coast Railway Company,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL FIRST DISTRICT, STATE OF FLORIDA

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QUESTION PRESENTED FOR REVIEW

The Petitioner believes that a more accurate statement of the question presented for review is whether the trial court adequately instructed the jury based upon the law applicable to the facts of this case.

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STATEMENT OF THE CASE

Respondent accepts Petitioner's statement of the case but believes certain amplification is necessary and adds that herein.

Petitioner filed this suit based upon charges of negligence and accordingly a violation of 45 USC §51, as well as violation of 45 USC §2 (commonly called the Safety Appliance Act). Subsequently the charges of negligence were dropped and the Plaintiff proceeded to trial solely on the basis of whether there was a violation of 45 USC §2, which pertains to the type of couplers to be provided by a common carrier on cars used on its railroad. Petitioner did, however, produce evidence in its case in chief regarding the reasons for a coupler to be hard to move when it is pushed to one side or the other of the center of the car. It was the contention here that the coupler could be hard to move due to a faulty slide plate.

In the trial, all witnesses agreed that side play is necessary for the operation of railroads. It was further undisputed that couplers can be misaligned to the point that they cannot be coupled and this is not indicative of a defect with the coupler or the drawhead to which it is attached. As indicated in Petitioner's statement of the case, couplers can be moved off center due to being uncoupled on a curve or due to two couplers coming together where the knuckles are closed and thereby pushing the drawhead and coupler off to the side. Again, a coupler can be in working condition and, in fact, good condition and still be too far off to one side to allow coupling due to the existence of side play or lateral movement. In this particular case, the Plaintiff saw nothing defective with the coupler, the drawhead or the knuckle and no evidence was produced at trial to show that the coupler, drawhead or knuckle were in fact defective.

The trial court, after receiving requested jury instructions from Petitioner and Respondent, charged the jury by reading the applicable portions of the statute involved, 45 USC §2. (See full jury charge in Appendix). Upon return of a verdict in favor of Respondent and entry of a Final Judgment in favor of same, Petitioner appealed to the Florida First District Court of Appeal. Thereafter, on December 30, 1980, that court entered, without opinion, a per curiam affirmance of the trial court's entry of Final Judgment.

REASONS WHY THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

SUMMARY OF ARGUMENT

From reading the decisions of this Court, it is apparent that in fact the jury charge, as given by the trial court, was proper in that it left for the jury to determine whether or not the existence of side play in the coupler and drawhead involved would be in compliance with 45 USC §2 or not. In other words, it was for the jury to determine if the side play as existing complied with the Safety Appliance Act.

In view of the fact that no written opinion was rendered by the Florida First District Court of Appeal, it is not known upon what grounds the trial court's entry of Final Judgment was affirmed. There are, however, alternative grounds from those stated by Petitioner. The appellate court below could have found that the requested jury instructions, as presented by the Petitioner, were erroneous and not necessary and which is sufficient basis to sustain the trial court's decision.

No conflict exists between the decision of the Florida First District Court of Appeal and decisions of this Court, a federal court of appeals or other state courts of last resort. The cases cited by Petitioner are factually distinguishable and different issues were before the appellate court in those cases.

ARGUMENT

A. DECISION OF STATE APPELLATE COURT AFFIRMING THE RULINGS OF TRIAL COURT DOES NOT CONFLICT WITH DECISIONS OF THIS COURT. IN FACT THE DECISION IS SUPPORTED BY THIS COURT'S OPINIONS.

1. No conflict with decisions of this Court.

Petitioner maintains the decision of the First District is in conflict with opinions of this Court, specifically the decisions of *O'Donnell vs. Elgin, Joliet & Eastern Railway Company,* 338 US 384 (1949), *Carter v. Atlanta & St. Andrews Bay Ry. Co.,* 338 US 430 (1949), and *Affolder v. New York, C. & St. L. R. Co.,* 339 US 96 (1950). Review of these cases shows that there is no conflict.

The *O'Donnell* case involved the death of a railroad employee due to being struck by cars that broke loose because a coupler broke. After the cars had come loose, they began to roll and thereafter struck the decedent. It was clear that the Plaintiff's case had been based upon the contention that the death arose as the result of the breaking of coupler. This court in an opinion written by Justice Jackson held that the Safety Appliance Act, 45 USC §2, would be violated by a coupler which broke and set cars free during a switching operation. The Court further ruled that it was not a question of negligence on the part of the defendant railroad with regard to its diligence and care to provide couplers that would not break. The issue was only to determine if the coupler had broken during a switching operation and if so, then that alone was sufficient to support a violation of the Safety Appliance Act.

Nothing in this Court's opinion in the *O'Donnell* case is in conflict with the case at bar. The issue was not one of a coupler breaking; there was no question of proving negligence.

The *Carter* decision of this Court is likewise not in conflict in that the facts and issues of law were different from those being considered at present. In that case one issue was whether the fact that the coupler had worked properly before and after the accident would be sufficient to take the case from the jury and allow the court to enter a verdict in favor of the defendant on the basis that no violation of the Safety Appliance Act had been proven. This Court held that

the question for the jury was whether the coupler worked properly at the time in issue and not whether it worked properly before or after. In so holding, it was stated that negligence was not an element that must be proven in order to show a violation of the Safety Appliance Act. That is the sum and substance of the opinion, insofar as it could in any way be related to this case.

In the case at bar, the trial court did not instruct the jury that negligence must be proven, nor were there any instructions given regarding the functioning of this coupler before or after the incident in which the Plaintiff was injured.

The *Affolder* decision is clearly not in conflict and in fact supports the trial court's action below. In *Affolder,* the trial court instructed the jury in the language of 45 US §2 and left it up to the jury to decide if in fact the defendant railroad had violated the Safety Appliance Act by using cars not equipped with couplers coupling automatically by impact. The jury found for the plaintiff and in the course of rendering its verdict found that the defendant had in fact violated the Safety Appliance Act. The Eighth Circuit Court of Appeals reversed the trial court and this Court granted certiorari. The charge to the jury is contained in the opinion of the Eighth Circuit found at 174 F.2d 486 (8th Cir. 1949).

In reviewing the trial court's instruction, Justice Clark found that it was adequate and specifically that there was no need to explain to the jury that the couplers, or at least one of them, had to be opened prior to impact in order to find a violation of the Act. Justice Clark wrote that this issue was one that was properly left to counsel to argue and that the charge was sufficient to inform the jury of the relevant law.

Likewise, in the case at bar, the court instructed in the language of the statute and left it to the jury to determine if in fact the statute had been complied with or violated based upon the evidence presented. This is exactly what the *Affolder* decision stands for. It should be noted, also, that

Affolder does hold that couplers must be positioned properly in order to function and if they are not so positioned and then do not couple upon impact, there will not be a violation of the Act. This is significant in that it establishes that certain conditions must be met in order for a coupler to function. The Petitioner's requested instruction number 5 did not recognize that these conditions must be met and is therefore contrary to *Affolder.*

Again, there is no conflict between the decision below and the holdings of this Court.

2. Decision by state appellate court supported by this Court's opinions.

Not only is there no conflict between the decision of this Court and that of the state appellate court, but review of the applicable cases show that this Court's opinions support the decisions of the state appellate court and trial court. The key fact here is that this Court has established that it is the function of the jury to determine if the Safety Appliance Act is violated and that it is the jury's province to apply the statute to the evidence as presented to it. More specifically, this Court has left to the jury the question of determining whether or not the Safety Appliance Act is violated due to side play in couplers and drawheads.

In that regard, this Court has recognized the existence and necessity of side play in couplers and drawheads to which the coupler is attached. In *Atlantic City R. R. Co. v. Parker,* 242 U.S. 56 (1916), 37 S.Ct. 69, 61 L.Ed. 150, Justice Holmes was considering whether or not the trial court had properly let a case go to a jury when the case involved the question of aligning a coupler by moving the drawhead. It was concluded that, in fact, a question for the jury had been raised and that the court was correct in allowing a jury to decide it. In so ruling, this Court noted that side play must be allowed in drawheads and that

whether the side play is too great or not, is for the jury to determine from the facts. Justice Holmes wrote:

> Some lateral play must be allowed to drawheads and further, the car was on a curve, which, of course, would tend to throw the coupler out of line. But a jury were warranted in finding that the curve was so slight as not to affect the case and then regarding the track as for this purpose, a straight line. If couplers failed to couple automatically upon the straight track, it at least may be said that a jury would be warranted in finding that a lateral play so great as to prevent coupling is not needed, and that, in the absence of any explanation believed by them, the failure indicated that the Railroad did not fully comply with the law. 242 U.S. at 59.

Clearly then, this Court here held that it is for the jury to determine whether or not a particular coupler complies with the Safety Appliance Act from the evidence presented to it. It is also equally clear that side play in and of itself which may require adjustment of the coupler, does not necessarily constitute a violation of the Act as Petitioner claims and that it is up to the jury to make this determination.

The question of whether side play or lateral movement in a coupler would be so excessive as to violate the Safety Appliance Act was again held by this Court to be an issue for the jury in *San Antonio Railway v. Wagner*, 241 U.S. 476, 36 S.Ct. 626, 60 L.Ed. 1110. There, Justice Pitney held that this was a question for the jury when he stated:

> The jury could reasonably find that the misalignment of the drawhead was greater than required to permit the rounding of curves, or, if not, then an adjusting lever should have been provided upon the engine as upon the car, and that there was none upon the engine. 241 U.S. at 484.

A reading of these opinions can only lead to the conclusion that the trial court correctly charged the jury in the statutory language and then left it up to the jury to determine if the Act had been violated by the presence of side play. Certainly under no circumstances can Petitioner support his contention that this Court has not made it clear that the question of side play and whether it was excessive or not is one for the jury to determine in order to see if the Safety Appliance Act was violated.

B. THE FIRST DISTRICT COURT OF APPEAL DID NOT DECIDE AN IMPORTANT QUESTION OF FEDERAL LAW.

Petitioner maintains that the per curiam decision, without a written opinion by the District Court of Appeal, First District, State of Florida, in fact did decide an important question of Federal law which has not been settled by this Court and therefore the Court should review this matter on that basis. That contention is not evident from the record since there is no written opinion establishing why the First District Court of Appeal affirmed the trial court. All that the First Dirstrict Court of Appeal did was to allow to stand the decision of the trial court to instruct the jury in the language of the statute and then submit the question of whether or not the Act was violated to the jury for its consideration. There are numerous reasons why the First District Court of Appeal could have done this.

First, the Petitioner's requested instructions numbered 1, 3 and 5, as set forth in pages five and six of his Petition, were, in the case of instruction number 1, an introductory instruction that was discretionary with the trial court; in case of requested instruction number 3, one that did not cover the issues presented by the evidence; and in the case of requested instructions numbered 3 and 5, ones that were not correct statements of the law in the form presented by the Petitioner.

It should be noted that requested instruction number 3 sought to have the jury instructed that a showing of diligence and due care could not excuse the Defendant Railroad from being found to have violated the Safety Appliance Act. This was never pleaded in this cause nor was any evidence adduced to show that the railroad has used due diligence to provide a coupler that functioned properly. In Florida, as is the case in all courts of our country, a trial court correctly denies instructions that have no basis in the evidence and that contain issues not raised by the evidence or covered by the pleadings. *Sermans v. Pittman,* 138 So.2nd 765 (1st D.C.A.,1962); *Smith v.Whidden,* 87 So.2nd 42 (Fla., 1956); *Garrison v. Hertz Corp.,* 129 So.2nd 452 (3rd D.C.A., 1961).

Instruction number 3 also contains an incorrect statement of the law in that it sought to have the jury instructed that it was the duty of the Defendant to keep couplers in such a condition that "they will perform their functions at all times". This is simply not the law since there are exceptions recognized to the requirement that couplers couple automatically by impact and uncouple automatically. *Affolder v. New York, C. & St. L. R. Co.,* 339 US 96, 70 S.Ct. 509, 94 L.Ed. 683 (1950), *McCalley v. Seaboard Coast Line Railroad Company,* 252 So.2d 275 (4th DCA, 1971). The court is, of course, not under a duty to give an instruction which contains an incorrect statement of the law. *Williams v. Chrysler Motor Corporation,* 270 So.2d 403 (3d DCA, 1972); *Cobb v. Union Railway Co.,* 318 F.2d 33 (6th Cir., 1963).

Petitioner's requested instruction number 5 also misstated the law in that it would require a jury to find a violation of the Safety Appliance Act if "it was necessary for Plaintiff to manually adjust the drawbar or a coupling mechanism in order to make the couplers couple automatically by impact". This, of course, is not the law and the trial court and Florida First District Court of Appeal correctly rejected that instruction on that basis alone. The inherent design of the coupler

is such that certain conditions must be met before the coupler will couple upon impact or can be uncoupled. Again, it is to this extent that there are exceptions and this Court has, in fact, recognized this fact in the *Affolder* decision, *supra*. There it was held that a finding that the Safety Appliance Act is violated where there is evidence of failure to couple:

> Assumes that the coupler was placed in a position to operate on impact. Thus, if "the failure of these two cars to couple on impact was because the coupler on the Pennsylvania car had not been properly opened", the Railroad had a good defense. 339 U.S. at 99.

Later in this same opinion this Court reaffirmed that the couplers must be open. And as footnote four of the opinion shows, a coupler is open if the knuckle is open. Justice Jackson in his dissent, noted that the Supreme Court recognized that "before a failure to couple establishes a defective coupler, it must be found that it was properly set so that it could couple. If it was not adjusted as such automatic couplers must be, of course, the failure is not that of the device." *Supra*, 339 U.S. at 101, 94 L.Ed. at 689. Clearly then, there will be no violation of the Safety Appliance Act if couplers fail to couple upon impact due to the failure to open a knuckle.

Again, the District Court of Appeal may very well have affirmed the trial court on the basis that the instructions that the Petitioner sought to have the court give were not necessary in the case of instruction numbers 1 and 3 and were incorrect statements of law in the case of instruction numbers 3 and 5.

Obviously, the state appellate court could very well have followed this Court's holdings in *Atlantic City R.R. Co. v. Parker, supra,* and *San Antonio Railway v. Wagner, supra.* We submit that based upon those opinions there was ample

guidance for the appellate court to affirm the decision of the trial court to let the jury decide whether the amount of side play present was in conformity with the Safety Appliance Act by instructing in terms of the statute itself.

C. NO CONFLICT WITH A FEDERAL COURT OF APPEALS OR OTHER STATE COURTS OF LAST RESORT.

Petitioner alleges that the decision rendered herein by the First District Court of Appeal represents a conflict with the United States Court of Appeals, Tenth Circuit, in its opinion of *Kansas City Southern Railway Company v. Cagle,* 229 F2nd 12 (10th Cir. 1955) and the Supreme Court of Utah in *McGowan v. Denver & R. G. W. R. Co.,* 244 F2nd 628 (Utah 1952). We again submit first that there is no way to determine if there is a conflict since the Florida First District Court of Appeal did not render an opinion and that there were alternative grounds upon which the court could affirm other than ruling that a drawbar or railroad car that is so far out of line as to prevent automatic coupling does not violate the Safety Appliance Act. As described previously, there are other grounds upon which the First District could have based its decision. Even if it is assumed, however, that the First District Court of Appeal did determine that a coupler misaligned so far as to prevent coupling is not necessarily a violation of the Safety Appliance Act, we submit that the *Cagle* and *McGowan* cases, *supra,* are distinguishable.

With respect to the *Cagle* opinion, the Petitioner maintains there is a direct conflict between that decision and the case at bar. In fact, there are substantial differences in those two cases which distinguish them. First, in the case before the Court here, there was no ruling by the trial court nor any decision recorded by the Florida First District Court of Appeal to the effect that misalignment of a coupler will not be a violation of the Safety Appliance Act. All that the trial court did was read the statute and then let the jury make the decision as to whether the coupling mechanism involved

was in complance with the Safety Appliance Act. The trial Court recognized that it was a jury question and submitted it to the jury. In the *Cagle* case there was before the court a question of whether there was sufficiency of evidence to support the judgment and it was not a case of specific jury instructions or the propriety of charging the jury in accordance with statutory language. The Tenth Circuit ruled that there was in fact sufficient evidence to support a verdict for the Plaintiff based upon its finding that there was evidence to show that the coupler was misaligned.

In the case presently before the Court there is an issue of whether the jury was properly instructed. On the other hand, the *Cagle* opinion again involved the issue of whether there was sufficient evidence to support the verdict and whether drawbar alignment was an issue for the jury to consider in order to determine if there was a violation of the Safety Appliance Act.

The *McGowan* case held that a Plaintiff does not have to show a defective or bad condition of a coupler but simply that it did not work. Along the same line, the court noted that negligence need not be proved. Again, the trial court below did not make any ruling contrary to this proposition.

The Utah Supreme Court in *McGowen* did, in considering the instructions given to the jury, hold that an instruction to the effect that adjusting the coupling mechanism in order to couple cars would violate the Safety Appliance Act was in error and cited *Affolder v. New York, C. & St. L. R. Co.*, 339 U.S. 96, 70 S.Ct. 509, 94 L.Ed. 683 (1950). In the *Affolder* decision, this Court recognized that there are certain conditions that must be met with regard to the coupler before it can function. Specifically, it was held therein that if at least one knuckle is not open on a coupler it cannot possibly couple and there would be no violation of the Act for failure to do so.

Reviewing the opinion in the *McGowen* case and specifically reading Plaintiff's instruction number 5 at page 631 of the opinion shows that it is essentially the same as Petitioner's requested instruction number 5. The Supreme Court of Utah found this instruction to be improper in light of *Affolder* but did not grant the Defendant relief because of the failure to object properly. It is clear that *McGowen* does not support the Plaintiff's claim that it's requested instruction should be given. Moreover, as stated above, the Utah Supreme Court specifically found that it would be improper to instruct a jury that any manual adjustment would violate the Safety Appliance Act. Additionally, *McGowen* was concerned about the fact that the Petitioner would have to go between the cars, and the Petitioner's requested instructions would require the jury to find a violation of the Safety Appliance Act for any adjustment whatsoever to the coupler regardless of the location of the individual making the adjustment and this is clearly not the law and not the holding of *McGowen*.

It is clear that the *Cagle* and *McGowen* cases are distinguishable and cannot be relied upon by the Petitioner to show a conflict if it is assumed that the appellate court below ruled as claimed. Moreover, these cases do not support the Petitioner's requested jury instructions.

CONCLUSION

The decision of the Florida Appellate Court, upholding the trial court, without an opinion, should not be reviewed by this Court. There is no conflict between decisions of this Court, federal courts of appeal or other state courts. The decision of the state court did not decide an important issue of federal law and there are absolutely no special or important reasons of granting Petitioner's request for a writ of certiorari. On the contrary, the decisions below are in accordance with this Court's construction of 45 USC §2 in that the jury was fully and adequately charged on the controlling law and then given the opportunity to make its decision as to whether or not the Safety Appliance Act had been violated. With the jury being properly charged on the law, its decision should stand.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this day of , 1981, three copies of the foregoing Response To Petition For Writ Of Certiorari have been furnished by United States mail, first class, postage prepaid, to the following:

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WILLIAM D. BARFIELD, *Esquire*
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_____
ATTORNEY

APPENDIX

JURY CHARGE

THE COURT: Ladies and gentlemen of the jury:

I shall now instruct you on the law that you must follow in reaching your verdict.

It is your duty as jurors to consider and weigh the evidence, to decide the disputed issues of fact and to apply the law to the facts as you find them from the evidence.

Your verdict must be based on the evidence that has been received and the law on which I am now instructing you. In reaching your verdict, you are not to be swayed from the performance of your duty by prejudice, sympathy, or any other sentiment for or against any party.

In determining the believability of any witness and the weight to be given his testimony, you may properly consider the demeanor of the witness while testifying, his frankness or lack of frankness, his intelligence, his interest, if any, in the outcome of the case, the means and opportunity he had to know the facts about which he testified, his ability to remember the matters about which he testified and the reasonableness of his testimony considered in light of all the evidence in the case and in the light of your own experience and common sense.

The Plaintiff, McARTHUR DAVIS, is seeking to recover money damages against the FLORIDA EAST COAST RAILWAY COMPANY for an injury he claims he received on August 18, 1976, while working as a switchman in Jacksonville, Florida.

Now, the issue for your determination is whether the Defendant violated the standards of the Federal Safety Appliance Act, and, if so, whether such violation was the cause or contributing cause of the injuries the Plaintiff claims he sustained.

The Plaintiff charges that the Defendant thereby was

guilty of a violation of the Act of Congress of the United States known as the Federal Safety Appliance Act.

The relevant portion of the Act reads:

"It shall be unlawful for any common carrier engaged in interstate commerce by railroad to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact" –

Defendant railroad admits the alleged railroad car, if involved, was hauled on its line and used in interstate commerce, but denies any violation of the Safety Appliance Act and any injury to Plaintiff resulting from any alleged violation of the Act.

Now, a violation of the Safety Appliance Act is a legal cause of injury if it produced or contributes, in whole or in part, to producing such injury.

If the greater weight of the evidence does not support the Plaintiff's claim under the Safety Appliance Act, then he cannot recover against the Railroad under that theory. However, if the greater weight of the evidence shows the Railroad failed to comply with the Safety Appliance Act and that such failure was a legal cause, in whole or in part, of the Plaintiff's injuries, then Plaintiff is entitled to recovery damages against the Defendant.

Now, the greater weight of the evidence means the more persuasive and convincing force and effect of the entire evidence in the case.

If you find for the Defendant, you will not consider the matter of damages. But if the evidence proves that the Defendant violated the Safety Appliance Act and that the violation was a legal cause of loss, injury or damage to Plaintiff, you should award Plaintiff an amount of money that the greater weight of evidence shows will fairly and

adequately compensate him for such loss, injury or damage including such damage as Plaintiff is reasonably certain to incur or experience in the future. You shall take into consideration the following elements:

1. Any bodily injury sustained by the Plaintiff and any resulting pain and suffering, disability, mental anguish and loss of capacity for the enjoyment of life experienced in the past or to be experienced in the future. There is no exact standard for fixing the compensation to be awarded on account of such elements of damages. Any such award should be fair and just in the light of the evidence.

Secondly, consider any earnings lost in the past and any loss of ability to earn money in the future.

If the greater weight of the evidence shows that the Plaintiff has been permanently injured, you may consider life expectancy. The mortality tables received in evidence may be considered in determining how long he may be expected to live. Such tables are not binding upon you, but may be considered together with other evidence in the case bearing on the Plaintiff's health, age, and physical condition before and after the injury in determing the probably length of his life.

Any amounts which you allow in damages for future loss of ability to earn money in the future should be reduced to the recent money value, and only the present money value of such amounts should be included in your verdict.

An injured party is under a legal obligation to mitigate his damages, that is, to minimize the economic loss resulting from his injury, by resuming gainful employment as soon as can reasonably be done. He may recover damages for lost earnings, and for the loss of the ability to earn money in the future, but is precluded

from the recovery to the extent that he could have earned wages in the past and to the extent that he has the ability to earn money in the future.

In considering mitigation of the damages, the rule is that one will be required to submit to an operation only when a reasonably prudent man under the circumstances would do so.

(Note: The remainder of the jury instruction dealt with the verdict forms.)